IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

KSM ASSOCIATES, INC.,	:	
Plaintiff,	:	**CIVIL ACTION**
	:	
v.	:	
	:	
ACS STATE HEALTHCARE, LLC,	:	**No. 05-4118**
Defendant.	:	

MEMORANDUM AND ORDER

Schiller, J. **May 10, 2006**

This action arises from a contractual dispute between Plaintiff KSM Associates, Inc. ("KSM") and Defendant ACS State Healthcare, LLC ("ACS"). KSM asserts breach of contract, breach of oral contract, quantum meruit, and promissory estoppel claims against ACS. ACS seeks a declaratory judgment limiting the extent of ACS' contractual liability. Presently before the Court is Defendant's motion for summary judgment on all counts of Plaintiff's Complaint and on Defendant's declaratory judgment counterclaim. For the reasons below, Defendant's motion is granted in part and denied in part.

I. BACKGROUND

A more detailed factual background may be found in *KSM Associates, Inc. v. ACS State Healthcare, LLC*, Civ. A. No. 05-4118, 2006 WL 847786, at *1-*2 (E.D. Pa. Mar. 30, 2006).

In August of 2004, ACS and KSM entered into a letter of intent agreement ("LOI") for system development services. (Pl.'s Mem. of Law in Opp'n to Def.'s Mot. for Summ. J. [Pl.'s Mem. of Law in Opp'n] at 9; Ex. L [LOI].) The companies planned to negotiate and execute a formal, comprehensive agreement ("Services Agreement") setting forth their respective rights and

obligations. (LOI at 1.) However, to meet ACS' desired implementation schedule, the LOI provided that "KSM [would] begin staff hiring, project planning and system development activities prior to the execution of the Services Agreement." (*Id*.) Under the LOI, KSM would be compensated $100,000 for labor and materials. (*Id*.) KSM submitted an initial project plan to ACS in September of 2004, and representatives for the parties held weekly conference calls about the project from September through November of 2004. (Pl.'s Mem. of Law in Opp'n at 13, 18-19.) In early November of 2004, KSM sent invoices to ACS covering the services rendered to date. (*Id*. at 20.)

The parties neither finalized nor executed the Services Agreement. (Def.'s Mem. of Law in Supp. of Mot. for Summ. J. at 10.) On or around November 22, 2004, ACS sent KSM a notice of termination letter requesting KSM to send its final invoice. (Pl.'s Mem. of Law in Opp'n at 22.) KSM sent a final invoice to ACS and forwarded its work product to ACS. (*Id*. at 22-23.) ACS provided KSM a $100,000 check for its services, and maintains that it owes KSM nothing more. (*Id*. at 23; Def.'s Mem. of Law in Supp. of Mot. for Summ. J. at 2-3.) KSM seeks the total invoiced payment amount of $574,950, asserting that it provided services beyond the scope of the initial LOI. (Pl.'s Mem. of Law in Opp'n at 1-2, 4.)

II. STANDARD OF REVIEW

Summary judgment is appropriate when the admissible evidence fails to demonstrate a dispute of material fact and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). When the moving party does not bear the burden of persuasion at trial, the moving party may meet its burden on summary judgment by showing that the nonmoving party's evidence is insufficient to carry its burden of

persuasion at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). Thereafter, the nonmoving party demonstrates a genuine issue of material fact if sufficient evidence is provided to allow a reasonable jury to find for him at trial. *Anderson*, 477 U.S. at 248. In reviewing the record, "a court must view the facts in the light most favorable to the nonmoving party and draw all inferences in that party's favor." *Armbruster v. Unisys Corp.*, 32 F.3d 768, 777 (3d Cir. 1994). Furthermore, a court may not make credibility determinations or weigh the evidence in making its determination. *See Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 150 (2000); *see also Goodman v. Pa. Tpk. Comm'n*, 293 F.3d 655, 665 (3d Cir. 2002).

III. DISCUSSION

A. Lack of an Express Promise Defeats KSM's Promissory Estoppel Claim

Under Pennsylvania law, the elements for a promissory estoppel or detrimental reliance claim are: "(1) the promisor made a promise that he should have reasonably expected to induce action or forbearance on the part of the promisee; (2) the promisee actually took action or refrained from taking action in reliance on the promise; and (3) injustice can be avoided only by enforcing the promise." *Edwards v. Wyatt*, 335 F.3d 261, 277 (3d Cir. 2003) (*citing Crouse v. Cyclops Indus.*, 745 A.2d 606, 610 (Pa. 2000)); *see also C & K Petroleum Prods., Inc. v. Equibank*, 839 F.2d 188, 192 (3d Cir. 1988) (Pennsylvania adopts promissory estoppel doctrine embodied in Restatement (Second) of Contracts § 90). The Pennsylvania Supreme Court has not decided whether an express promise is required or whether an implied promise, inferred from a party's conduct or silence, is sufficient to establish promissory estoppel. *Nabisco, Inc. v. Ellison*, Civ. A. No. 94-1722, 1994 WL 622136, at *6 (E.D. Pa. Nov. 8, 1994). One line of cases, espousing a theory based on an equitable estoppel

analysis, holds that conduct or silence may constitute a promise for purposes of promissory estoppel. *Id*. (*citing Rinehimer v. Luzerne County Cmty. Coll.*, 539 A.2d 1298, 1306 (Pa. Super. Ct. 1988) & *Arasi v. NEEMA Med. Servs., Inc.*, 595 A.2d 1205, 1209 (Pa. Super. Ct. 1991)).

The Third Circuit has adopted a divergent view, however, and concluded that there can be no justifiable reliance without an express promise. *Id*. (*citing C & K Petroleum Prods.*, 839 F.2d at 191-92 & *Schleig v. Commc'ns Satellite Corp.*, 698 F. Supp. 1241, 1249 (M.D. Pa. 1988)). The Third Circuit has reasoned that reliance on an implied promise is not reasonable, and, therefore, an implied promise is insufficient to assert a claim for promissory estoppel under Pennsylvania law. *See id*. at *7. "Promissory estoppel would be rendered meaningless if this Court were to allow [plaintiff] to maintain an action for detrimental reliance based on the alleged existence of [ ] a broad and vague implied promise." *C & K Petroleum Prods.*, 839 F.2d at 192. Moreover, in order to qualify as an express promise, "[t]he promise must be certain and explicit enough so that the full intention of the parties may be ascertained to a reasonable certainty." *Ankerstjerne v. Schlumberger Ltd.*, Civ. A. No. 03-3607, 2004 WL 1068806, at *5 (E.D. Pa. May 12, 2004).

Here, KSM points to no express promise upon which it could have reasonably relied. ACS never expressly promised: (1) to pay KSM more than the $100,000 fee stated in the LOI; (2) to pay KSM for the services completed by KSM as documented in their submitted invoices; or (3) to finalize the comprehensive Services Agreement and thereby authorize additional payment for KSM.

The only "promises" KSM asserts in support of its promissory estoppel claim are broad and vague implied promises. KSM first points to statements made by Keith Johnson, ACS Project manager, to KSM and to KSM team member Guy Henniger in particular, that: (1) ACS was preparing and finalizing the Services Agreement; (2) the Services Agreement was forthcoming; (3)

the Services Agreement was done except for plugging in payment dates; and (4) the Services Agreement would govern the project. (Pl.'s Mem. of Law in Opp'n at 24, Ex. SS [Kim Dep.] at 52, 56-58, 62-63, Ex. TT [Henniger Dep.] at 54, 158-59, Ex. VV [Allen Dep.] at 90, Ex. CCC [Kim Aff.] ¶¶ 20, 35.) None of these statements rise to the level of an express promise to execute the Services Agreement. Indeed, even assuming that these statements constituted a promise to execute the Services Agreement, the terms of the finalized contract remained unresolved, including the scope of the contracted services and any additional compensation to KSM. Thus, these statements are too "broad and vague" to support KSM's promissory estoppel claim.

KSM also points to a statement made by Tracey Massey of ACS during a weekly conference call in mid-October of 2004 to members of the KSM team, including Henniger and Jason Kim, that ACS "hired KSM to do whatever it takes to make [the] 2/28/05 date."[1] (Pl.'s Mem. of Law in Opp'n at 15, 27; Kim Dep. at 124; Henniger Dep. at 86; Kim Aff. ¶ 19.) KSM understood Massey's statement to mean that "ACS wanted KSM to meet the final delivery date at any reasonable costs." (Kim Aff. ¶ 19.) Despite this allegation by KSM, the Court finds that this statement contains no express promise that ACS agreed to pay KSM above the $100,000 cap included in the LOI. This statement is neither explicit, nor does it indicate with reasonable certainty the intent of the parties.

KSM points to a third statement, by Johnson to Kim and Henniger during the parties' final conference call on November 24, 2004, that KSM should include its rampdown costs in its final invoice and that he would "see what he could do" about payment of those costs. (Henniger Dep. at 99, 101; *see also* Kim Aff. ¶ 37 ("I reminded Keith Johnson that KSM had outstanding KSM

[1] Massey denies making this statement. (Pl.'s Mem. of Law in Opp'n Ex. WW [Massey Dep.] at 139.) However, the Court views the evidence in the light most favorable to nonmovant KSM in considering ACS' summary judgment motion.

invoices to which Keith Johnson replied that he would process them for us right away.").) However, Henniger acknowledged that Johnson did not guarantee any payment. (Henniger Dep. at 101 ("He was very careful not to guarantee in that scenario.").) Again, this statement is too vague to represent an express promise of payment to KSM. In a case with similar implied promises to the ones alleged here, another court in this District found the oral promises too indefinite to support a promissory estoppel claim. *See Ankerstjerne*, 2004 WL 1068806, at *6. In *Ankerstjerne*, the defendant told the plaintiff: (1) "it was ridiculous that the plaintiff was not compensated for [Project A]" and he "would get it taken care of;" and (2) "[Project B] would be taken care of as per the terms of [his] compensation plan." *Id*. The Court rejected a promissory estoppel claim premised on these statements because the implied promises did not "indicate[ ] how much the plaintiff would be paid, by whom he would be paid, how payment was to be calculated, or when the plaintiff would be paid." *Id*. Here, the promises are less definite than those in *Ankerstjerne* because ACS never guaranteed any payment of KSM's invoiced services or rampdown costs.

As KSM cannot identify an express promise by ACS upon which it reasonably relied, the promissory estoppel claim fails as a matter of law. Accordingly, the Court dismisses Count IV (promissory estoppel/detrimental reliance) of Plaintiff's Complaint.

B. Material Factual Disputes Preclude Summary Judgment on Remaining Claims

Genuine issues of material fact prevent the Court from disposing of the remaining claims at the summary judgment stage. Factual disputes exist regarding: (1) the scope of the services covered by the LOI; (2) whether KSM performed services outside the scope of the LOI; (3) whether the parties modified the LOI through their words and/or conduct; and (4) whether the parties entered an oral contract for services beyond the scope of the LOI. (*See* Pl.'s Mem. of Law in Opp'n at 25-27,

34-35, 38-39, 43, 46.) These factual issues are material to the resolution of each of the remaining claims and must be determined by a jury.

Count I of Plaintiff's Complaint, breach of contract, is dependent on whether the parties modified the LOI. *See, e.g., Sonfast Corp. v. York Int'l Corp.*, 875 F. Supp. 1088, 1094-95 (M.D. Pa. 1994) ("[W]here conflicting evidence is presented concerning parol modification of a contract, it is within the province of the jury to define it's [sic] terms."); *Somerset Cmty. Hosp. v. Allen B. Mitchell & Assocs., Inc.*, 685 A.2d 141, 147 (Pa. Super. Ct. 1996). Count II of Plaintiff's Complaint, breach of oral contract, is dependent on whether the parties entered an oral contract. *See, e.g., MLEA, Inc. v. Atl. Recycled Rubber, Inc.*, Civ. A. No. 02-4393, 2005 WL 1217190, at *3 (E.D. Pa. May 19, 2005) (whether contract formed is issue for jury to decide when facts in dispute); *Ingrassia Constr. Co. v. Walsh*, 486 A.2d 478, 482-84 (Pa. Super. Ct. 1984) (same). Count III of Plaintiff's Complaint, unjust enrichment, is dependent on whether KSM performed services outside the scope of the LOI. *See, e.g., United Artists Theatre Cir., Inc. v. Monarch, Inc.*, Civ. A. Nos. 94-2155, 95-6894, 1996 WL 711483, at *7 (E.D. Pa. Dec. 9, 1996) (party may recover under unjust enrichment theory for services performed outside scope of contract, and jury decides whether services fall beyond scope of contractual duties); *Combustion Sys. Servs., Inc. v. Schuylkill Energy Res., Inc.*, Civ. A. No. 92-4228, 1993 WL 523713, at * 5 (E.D. Pa. Dec. 15, 1993) (same). Count II of Defendant's Second Amended Counterclaims, seeking a declaratory judgment that ACS' liability is subject to the $100,000 cap in the LOI, is dependent on whether the parties modified the LOI or whether the parties entered an oral contract for services beyond the scope of the LOI.

Accordingly, because these factual matters must be assessed by a jury, the Court denies Defendant's motion for summary judgment with respect to the remaining claims.

IV. CONCLUSION

For the foregoing reasons, Defendant's motion for summary judgment is granted with respect to Count IV of Plaintiff's Complaint and denied with respect to the remaining counts of Plaintiff's Complaint and Count II of Defendant's Second Amended Counterclaims. An appropriate Order follows.

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v.	:	
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ACS STATE HEALTHCARE, LLC,	:	**No. 05-4118**
Defendant.	:	

ORDER

AND NOW, this **10th** day of **May 2006**, upon consideration of Defendant's Motion for Summary Judgment, Plaintiff's response thereto, Defendant's reply thereon, and for the foregoing reasons, it is hereby **ORDERED** that:

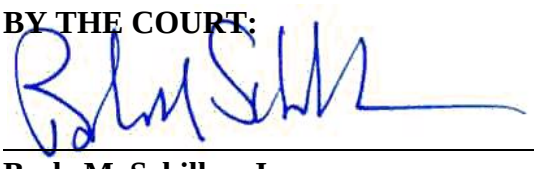
1. Defendant's motion for leave to file reply (Document No. 47) is **GRANTED**.

2. Defendant's motion for summary judgment (Document No. 41) is **GRANTED in part** and **DENIED in part** as follows:

   a. Summary judgment is **DENIED** with respect to Count I (breach of contract), Count II (breach of oral contract), and Count III (quantum meruit/unjust enrichment) of Plaintiff's Complaint and Count II (declaratory judgment) of Defendant's Second Amended Counterclaims;

   b. Summary judgment is **GRANTED** with respect to Count IV (promissory estoppel/detrimental reliance) of Plaintiff's Complaint. Count IV of Plaintiff's Complaint is **DISMISSED**.

BY THE COURT:



Berle M. Schiller, J.